

26
FILED
JUN 6 1942
MADE RECORDED
INDEXED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 128

MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,
Appellants,

vs.

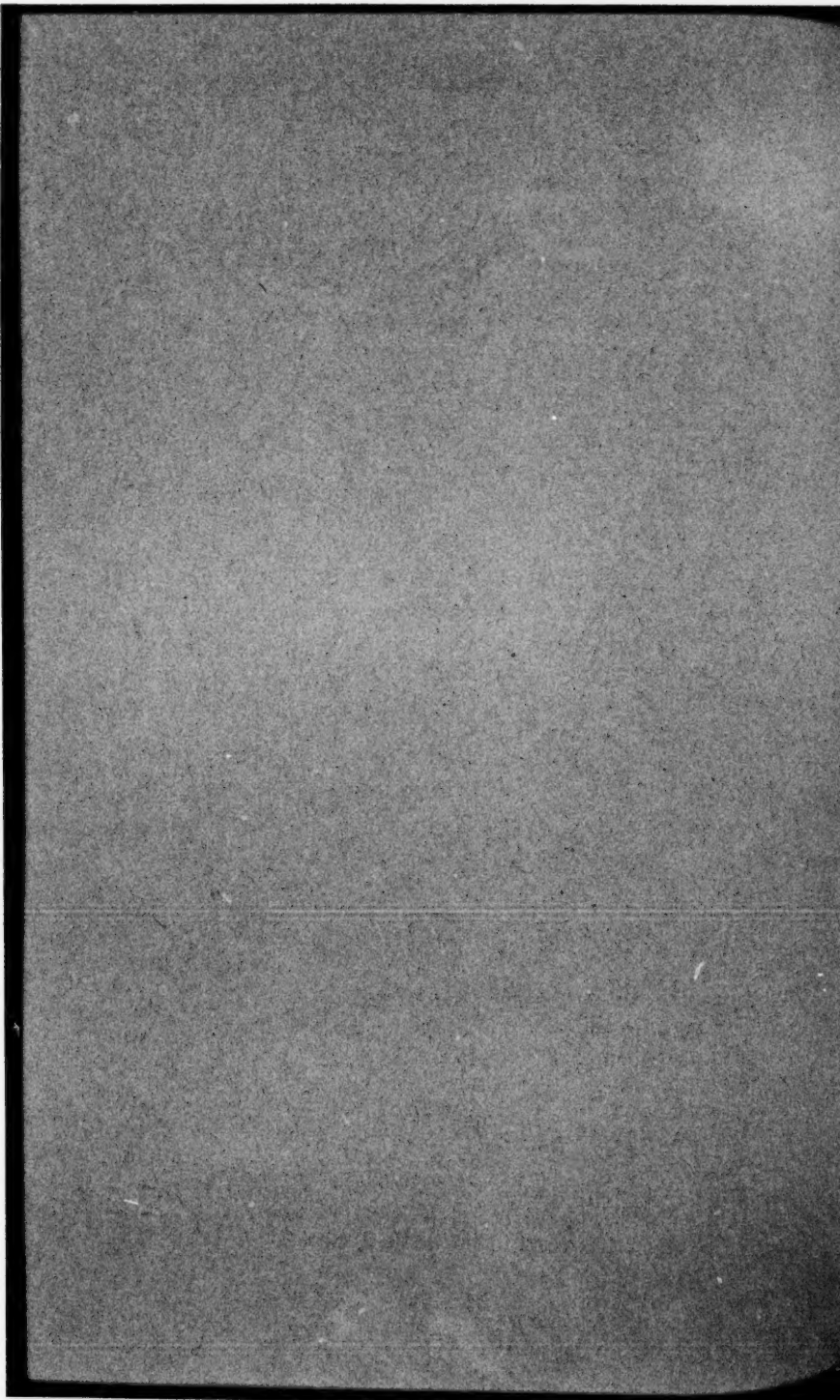
J. B. FERGUSON, H. L. CONLEY, GEORGE BRADLEY,
Etc., Et Al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

STATEMENT AS TO JURISDICTION

W. E. WEAVER,
JOHN F. MARTIN,
H. C. LOVE,
T. ADAMS GAVIN,
Counsel for Appellants

LOONEY, WATTS, PARSON & KERRICK,
Of Counsel.



INDEX.

SUBJECT INDEX.

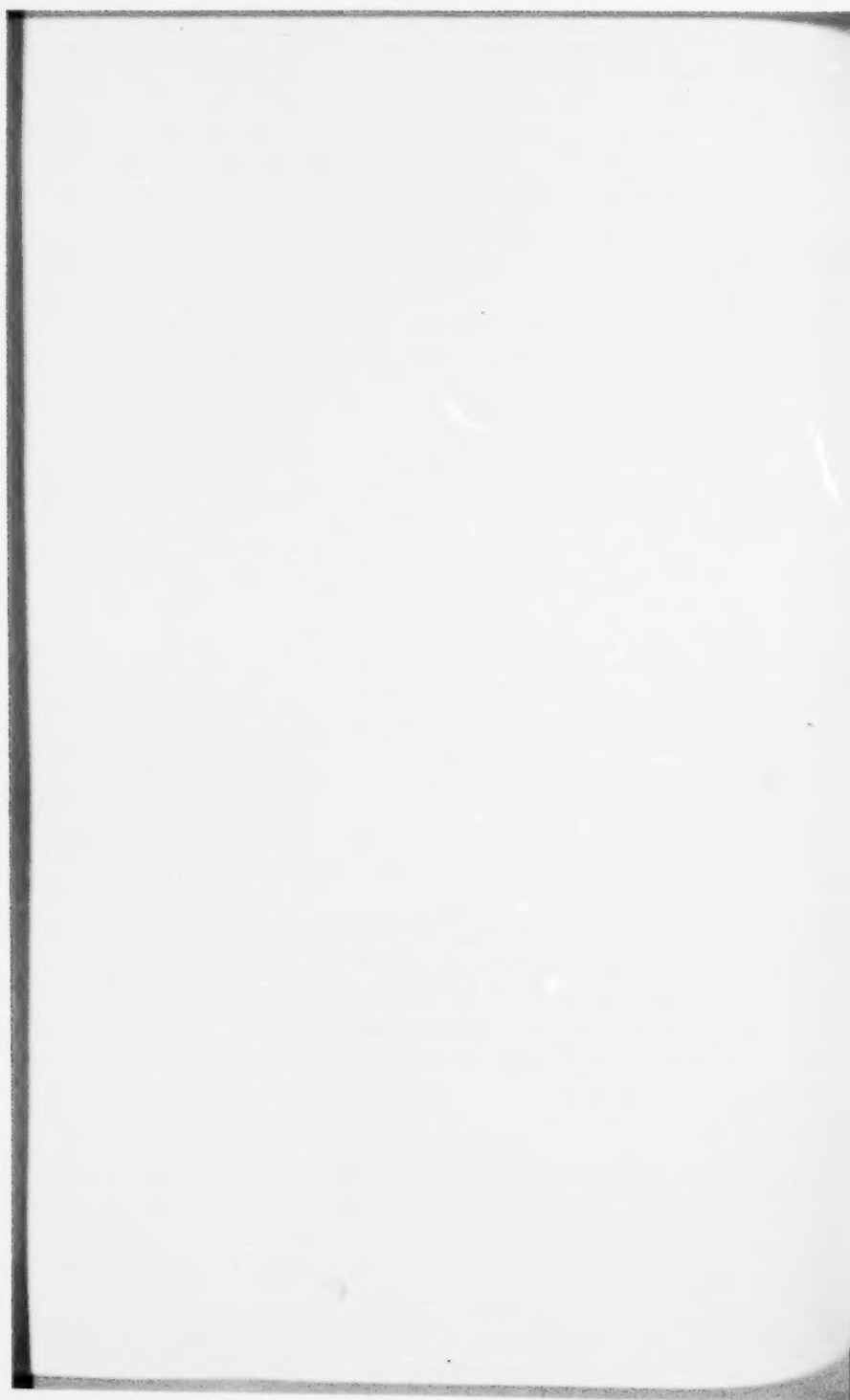
| | Page |
|---|------|
| Statement as to jurisdiction | 1 |
| Statement of the case | 2 |
| Appendix "A"—Letter, dated March 23, 1937, from the Attorney General of Oklahoma, to A. L. Crable, State Superintendent of Public Instruction | 15 |
| Appendix "B"—Opinion of the Supreme Court of Oklahoma | 21 |

TABLE OF CASES CITED.

| | |
|---|---|
| <i>Cochran v. Louisiana State Board of Education</i> , 281 U. S. 370 | 7 |
| <i>Meyer v. State of Nebraska</i> , 262 U. S. 390 | 9 |
| <i>Pierce v. Society of Sisters of Holy Name</i> , 268 U. S. 1079 | 9 |

STATUTES CITED.

| | |
|---|------|
| Constitution of the State of Oklahoma: | |
| Article 2, Section 5 | 6, 7 |
| Article 5, Section 57 | 6 |
| Article 11, Section 3 | 6, 7 |
| Article 13, Section 4 | 10 |
| Constitution of the United States: | |
| Article I | 12 |
| Article IV | 11 |
| Article VI | 11 |
| Fifth Amendment | 13 |
| Fourteenth Amendment | 13 |
| Judicial Code, Section 266 | 2 |
| Louisiana Treaty of 1803 (U. S. Stats. at Large, Vol. 8, p. 220) | 2 |
| Oklahoma Statutes of 1941, Title 70: | |
| Paragraph 183 | 2 |
| Section 301 | 10 |
| Section 401 | 10 |
| Section 403 | 10 |
| Section 460 | 10 |
| Section 1196 | 5 |
| Session Laws of Oklahoma of 1939, page 183 (Okla- homa Statutes of 1941, Title 70, Section 1196) | 2 |
| United States Code Annotated, Title 8, Sec. 43 | 13 |



IN THE SUPREME COURT OF THE STATE OF
OKLAHOMA

No. 29754

MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,
vs. Plaintiffs in Error,

J. R. FERGUSON, H. L. CONLEY AND GEORGE BRAD-
LEY, DIRECTORS OF INDEPENDENT CONSOLIDATED SCHOOL
DISTRICT No. 7, OF HARRAH, OKLAHOMA COUNTY, STATE
OF OKLAHOMA, A BODY POLITIC; PEARL CARPENTER,
CLAUDE MARTIN, FRED MITCHELL, JOHN SEN-
KOWSKI AND N. H. KOOCE,
Defendants in Error.

**STATEMENT OF APPELLANTS (PLAINTIFFS IN
ERROR) TO BE FILED, ALONG WITH ACCOMPANY-
ING RECORD, IN THE SUPREME COURT OF THE
UNITED STATES, ACCOMPANYING WRIT OF AP-
PEAL HERETOFORE AND ON THE 14TH DAY OF
MAY, 1942, GRANTED BY THE SUPREME COURT
OF THE STATE OF OKLAHOMA, TO THE SAID
SUPREME COURT OF THE UNITED STATES, DIS-
CLOSING BASIS UPON WHICH IT IS CONTENDED
THAT THE HONORABLE SUPREME COURT OF
THE UNITED STATES HAS JURISDICTION, UPON
AN APPEAL TO THAT COURT, TO REVIEW THE
JUDGMENT OR DECREE IN QUESTION.**

The above named appellants (Plaintiffs in Error below)
ask this Honorable Court to take jurisdiction of this pro-

ceeding under various constitutional provisions, Judicial Code No. 266, and to enforce the terms of the treaty between the Republic of France and the Republic of the United States commonly known as the Louisiana Treaty of the year 1803, and particularly Article 111 thereof. (U. S. statutes at Large, Volume 8, page 220.)

Statement of the Case.

Section 1, Session Laws of Oklahoma, 1939, page 183, is as follows:

“That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this state shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board.”

being now known as Title 70, Section 1196. Oklahoma Statute 1941.

On the opening day of the schools—public, private and parochial—for the scholastic year 1939 and 1940, the appellants were residents, citizens and taxpayers of Independent Consolidated School District No. 7 of Harrah, Oklahoma County, State of Oklahoma, which, under the school laws of Oklahoma, is constituted a body corporate, Title 70, paragraph 183, Oklahoma Statutes, 1941, providing, among other things, the following:

“Independent District a Body Corporate—Powers—Actions. • • •”

The above named school district, together with its trustees in charge of its corporate affairs, and the five drivers of

school bus routes within the territorial confines of said district are, respectively, the respondents herein.

On the morning of the opening of school ten children of these three appellants, taxpayers of said district, of compulsory school age, were tendered at convenient points along the highway some two to four or probably five miles from the location of the consolidated school within the town of Harrah which was being operated as a public school, and for the purpose of being transported to the site of the public or common school within the town of Harrah, intending to walk from there, in compliance with said Act, to the parochial school known as St. Teresa, which is a Roman Catholic parochial school, taught by Roman Catholic Sisters of the Carmelite Order within the said town of Harrah. The children so tendered were refused transportation notwithstanding the 1939 Act of the Legislature of Oklahoma, aforesaid. Thereupon the three appellants instituted an action in Mandamus, setting out in detail, in three separate counts each for the three families (R. 26 to 38), said actions being instituted in the District Court of Oklahoma County, of which all the respondents herein were residents to enforce the legislative enactment aforesaid.

An alternative writ of mandamus was issued, directing the respondents to show cause why the writ of mandamus should not be issued requiring them to comply with the aforesaid transportation act as to school buses of said School District (R. 43 to 50).

Each set of defendants appeared and contested the legality of this act, by demurrer. The respondents, School District and Trustees' demurrer appearing at pages 51 to 52 of record, and the bus drivers' separate demurrer appearing at pages 53 to 54 of record.

Thereupon, leave was granted the appellants, plaintiffs below, to file an amendment to their petition, pending determination of the demurrers filed by the respondents (R. 55

to 58). The essential allegations of this amendment to the appellants' original petition were that both St. Teresa Church and St. Teresa parochial school were established by and under the authority of the Roman Catholic Bishop of the State of Oklahoma; that said school is supported by private contributions, subscriptions and tuition, and is a private school; that it is open for instruction of pupils, whether of the Roman Catholic faith or not, and that pupils of the protestant faith, or those of no confessed religion at all, are freely admitted as pupils in said school, but that the children of Catholic parentage receive religious instructions in addition to the ordinary instructions given in said school district in the public or common schools; that children of non-Catholic faith may, at their option, or the option of their parents, take such religious instructions; that the same text books, being the free text books furnished to all children of compulsory school age of the State of Oklahoma, are in use in said St. Teresa Parochial school; that the teachers in said St. Teresa parochial school are qualified under the law of the State of Oklahoma as are teachers in public schools; that within the territorial confines of said respondent school district the census for the current school year of 1939-1940 shows 289 boys and 279 girls, or a total of 568 pupils, residents of said territorial school district falling within the compulsory school age under the laws of the State of Oklahoma; that said census includes all children attending St. Teresa parochial school, and that there is enrolled in St. Teresa parochial school a total of 41 children within said school age and residing within the territorial limits of said school district; that the said school board include in its budget to be collected by taxation on all property within said school district for the current year 1939-1940 a total of \$8450.00, to meet rental and hiring of vehicles for the transportation of all children attending school within said school district, which included

the children attending St. Teresa parochial school, and the taxpayers within said territorial limits of said school district have had levies made upon their property for the purpose of taxation, and for the specific purpose of furnishing \$8450.00 for the transportation of pupils, and that said tax has been assessed against all the property within said school district subject to taxation for said applicable fiscal year. That pupils attending said St. Teresa parochial school could conveniently be picked up by the five separate bus routes now serving said common or public schools at convenient places where other children attending public or common schools along said routes are located, and transported to said public or common school, and from there could conveniently walk to said St. Teresa parochial school, and that at the close of the school day in the afternoon said St. Teresa parochial school children could conveniently assemble at said public school building in the Town of Harrah, and be transported along the regular bus routes without any other expense whatsoever than had already been contracted by said school district board.

After the filing of this amendment to the petition, the respondents filed their separate demurrers, the school district and trustees' appearing at pages 79 to 81 of record, and the bus drivers' at pages 81 and 84 of record.

Upon consideration by the trial court, these demurrers were sustained on two grounds and overruled as to one ground. Said act, Section 1196, Title 70, Oklahoma Statutes 1941, being held unconstitutional on the second and third grounds set out in said demurrers. (Journal Entry of said judgment (R. 86 to 91).)

The appellants here elected to stand on their said petition and amendment to petition and refused to further plead, and said cause was dismissed, from which an appeal was duly perfected to the Supreme Court of Oklahoma, and there, in an opinion concurred in by eight of the Jus-

tices and dissented to by one of the Justices of said court, the trial court judgment was affirmed and petition for rehearing was duly presented (R. 108 to 114). This petition for rehearing, upon due consideration, was overruled on March 10, 1942, and thereupon this appeal has been brought to this Court by writ allowing the same by the Vice Chief Justice of the Supreme Court of Oklahoma (R. 13). Opinion of the Supreme Court of Oklahoma affirming the lower court's judgment denying the plaintiff the writ of mandamus applied for (R. 100 to 107).

The provisions of the opinion and the trial court's judgment are, first, a denial of the fact that House Bill No. 623 of the Legislature of Oklahoma, approved April 28, 1939, now Section 1196, Title 70, Oklahoma Statutes 1941, in any manner offended Section 57, Article 5, of the Constitution of the State of Oklahoma providing for the form of the title of a legislative act; second, that the said act and section aforesaid is in violation of Section 5 of Article 2 of the Constitution of the State of Oklahoma, in that the effect thereof is to appropriate public money or property, directly or indirectly, for the use, benefit, or support of any sect, church, denomination or system of religion, or for the use, benefit, or support of any sectarian institution as such, and is, therefore, void, and the demurrer of the defendants respondents herein should be and the same is hereby sustained; third, that the aforesaid act is in violation of Section 3, of Article 11, of the Constitution of the State of Oklahoma, in that it has the result of providing for the use of the permanent school fund for purposes other than the benefit of the common schools of the State, and said Act is, therefore, on said ground and for said reason void, and the demurrer of the defendants (respondents herein) thereto is hereby sustained.

The provisions of the Constitution, section 5, of the Article 2, are as follows :

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”

The above section is found in Oklahoma Statutes Annotated, Constitution of Oklahoma. The other section, to-wit: Section 3, of Article 11, Oklahoma Statutes Annotated, Constitution of Oklahoma, Page 1056, is as follows :

“The interest and income of the permanent school fund, the net income from the leasing of public lands which have been or may be granted by the United States to the State for the use and benefit of the common schools, together with any revenues derived from taxes authorized to be levied for such purposes, and any other sums which may be added thereto by law, shall be used and applied each year for the benefit of the common schools of the State, and shall be, for this purpose, apportioned among and between all the several common school districts of the State in proportion to the school population of the several districts, and no part of the fund shall ever be diverted from this purpose, or used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State.”

Were we to take the decision of this Honorable Court, speaking through Mr. Chief Justice Hughes, in the case of *Cochran v. Louisiana State Board of Education*, 281 U. S. 370, and superimpose upon said decision the words, “school buses” to be furnished children attending the parochial school in question, instead of “text books” furnished to the children of Louisiana attending such charac-

ter of schools, the court would have in this appeal a complete authority for granting of the right to appeal with the right on the part of the appellants to properly present the matter to this Honorable Court. In this connection, will say that the appellants attach hereto as a part of this, their showing, wherein they seek the jurisdiction of this Court to right this wrong, an opinion of the Attorney General of the State of Oklahoma after the U. S. Supreme Court's decision in the *Cochran* case, *supra*.

The fifth numerical section of the appellants' assignments of error (R. 3 to 11). The essential allegations therein are based upon Mr. Justice Hughes' decision affirming the text book case on appeal from the Supreme Court of Louisiana, *supra*. They are, in substance, to the effect that funds furnished students of private and parochial schools as provided by the 1939 Act and raised by general taxation as and when children attending such schools were transported therein, was in no manner in aid of religion prohibited by the provisions of the Constitution of the State of Oklahoma as decided by our Supreme Court, since the funds were raised by general taxation on all taxable property within said school district and in no manner dependent upon the public funds owned and held in the State of Oklahoma referred to in the constitutional provisions given by the trial court and the Supreme Court of Oklahoma as the reason for sustaining the demurrers to the appellants' petition and amendment to the petition, but were a benefit to the child and the public, they being school children of the State of Oklahoma along with all other children of compulsory school age in the State of Oklahoma attending public or common schools.

What is the use of a parent who desires to send his children to a parochial, religious or private school having the liberty so to do if he is denied free school bus transportation, when his children attending such schools are used

in the census of pupils of compulsory school age and public funds gathered by taxation levies against his property subject to taxation are the source of revenue by the expenditure of which said bus accommodations are given? The effect of the decision of the Supreme Court of Oklahoma denying this right deprives the parent of a valuable property right, results in taxation without any corresponding right to be enjoyed by him and his children, and is in violation of the fundamental rights of citizenship in this nation.

The State of Nebraska, by enforcement of a decision of the Supreme Court of that state, in *Meyer v. State of Nebraska*, 262 U. S. 390, in an opinion by former Justice McReynolds of this Honorable Court, reversed the Nebraska Supreme Court in its holding that instructions in any language in the schools other than the English language was illegal and unlawful under the laws of the State of Nebraska.

The State of Oregon in what is commonly known as the Oregon School Law, in the case of *Pierce v. Society of Sisters of Holy Name*, 268 U. S. 1079, had before it for construction the Oregon School Law compelling all persons of compulsory school age within said state to attend public schools. Mr. Justice McReynolds likewise delivered the opinion of this Honorable Court in said case, holding said law was unconstitutional and that the parent had the right to select the schools where he would send his children for their education. This decision is more or less on valuable property rights owned by the private or parochial schools which would have been completely destroyed had the Oregon school law been enforced, and also gives due consideration to the rights of a parent to exercise the power of selection as to what schools he will send his children. The Oklahoma decision is but another impediment thrown in the path and free passage of the parent in his election to send his children to a parochial or private school.

There is no reason appearing both in the trial court's decision and in the decision of the Supreme Court of Oklahoma for striking down the particular section of this 1939 Act as unconstitutional, any more than there would be in the refusing to allow free text books. The text books are furnished at public expense, and the buses for school transportation are furnished, as shown in the record in this case, by taxation against all property, based on all children of school age, parochial, private and public school children, and raised by assessment on common property subject to taxation within such district.

We now call this Honorable Court's attention to certain provisions of the school laws of Oklahoma. The taking of a school census within a school district such as the respondent is authorized by Section 301, Title 70, Oklahoma Statutes 1941. School children are declared to come within the compulsory school law, with certain exceptions, by the Constitution of Oklahoma, Section 4, of Article 13, O. S. A., Constitution. The Legislature of Oklahoma, by the provisions of Section 401, Title 70, Oklahoma Statutes 1941, fixes the compulsory school age of children at from 6 to 17 years of age. By the provisions of Section 403 of Title 70, Oklahoma Statutes 1941, free text books are furnished independent of what school a child of compulsory school age attends. Even our legislature has gone to the extent, by virtue of Section 460, Title 70, Oklahoma Statutes 1941, of providing for free bus transportation to all colored children, and in the event there are not as many as ten colored children attending a separate colored school, as required by Oklahoma law, then the school authorities having jurisdiction over such territory are authorized to transfer these pupils to other school districts, and such colored children of school age have the benefit of free bus transportation to the place where their schools are operated.

Article 111 of the Louisiana Treaty, which is binding on the residents within the territory so ceded by the Republic of France to the United States, book and page heretofore set out, is as follows:

“The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the provisions of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.”

It is fundamental that courts take judicial notice of geographical locations. It is, therefore, fundamental and needs no citation of authority, that the court will understand that Oklahoma, the entire state, is within the province ceded by the Republic of France to the United States under the treaty aforesaid.

Article IV of the Constitution of the United States reads as follows:

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

United States Constitution, Article VI, reads:

“All debts contracted and engagements entered into, before the adoption of this Constitution shall be valid against the United States under this Constitution as under the Confederation.

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

Article 1 of the Constitution of the United States reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitutional Amendment V provides that no person shall be:

"deprived of life, liberty or property without due process of law."

The amendment reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitutional Amendment XIV, Section 1, reads as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

United States Code Annotated, Title 8, Section 43, reads as follows:

“Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.”

We present that under the provisions of the Louisiana Treaty, the aforesaid sections of the original Constitution and Amendments V and XIV thereof, the Constitutional questions therein are supreme and paramount authority for the proper construction of the case we are now presenting to this Honorable Court for the purpose of having the same reversed on appeal, especially in the light of the fact that the funds used and expended in bus transportation for school children are furnished by taxpayers submitting to a levy of taxes for said purpose within the territorial limits of the school district respondent herein, and, therefore, now

respectfully submit this cause for the consideration of the Honorable Supreme Court of the United States, and request that that high Court take jurisdiction to resolve the apparent dispute shown by the foregoing and preceding statement to be involved in this controversy.

Respectfully submitted,

(Signed)

W. F. WILSON,
JOHN F. MARTIN,
E. C. LOVE,
LOONEY, WATTS, FENTON AND
EBERLE,
of Oklahoma City, Oklahoma;
T. AUSTIN GAVIN,
of Tulsa, Oklahoma,
Attorneys for Appellants.

